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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 729

JOSEPH SICILIANO,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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I.

It is argued by the respondent that the petitioner did not assert that he had been deprived of a federal right. The petitioner at the first opportunity in the trial court challenged the array of the jurors brought in by the sheriff contrary to the Jury Commissioner's Act. In the Supreme Court of the State of Illinois the petitioner claimed that he was deprived of a trial by a jury according to the laws of the State of Illinois. (See petition for Rehearing). The petitioner's contention that he was deprived of the right to a fair selection of the jury was tantamount to a claim that he was denied due process of law. The trial

of the petitioner under circumstances where he was forced to accept such bystanders as were summoned by the sheriff to fill the panel, cannot be consonant with due process. Such choice can hardly be said to insure a defendant the fair, impartial jury guaranteed by the federal constitution and the state constitution of Illinois. It was a cardinal rule at common law that jurors to be qualified as impartial should stand indifferent between the parties and be wholly free from even the suspicion of bias. This must be so if the constitutional guarantee of a trial by jury is to be had.

The case of *Edelman* v. *California,* 344 U.S. 357, cited by the respondent in support of their contention is distinguishable from our present case in that in the former case no objection was raised to the constitutionality of the vagrancy statute in the trial court and the question was raised for the first time on appeal. We believe that the petitioner in our case without directly quoting the due process clause of the Federal Constitution raised the question in the trial court and in the Supreme Court of the State of Illinois.

This court has even considered matters not raised in the courts below when failure to do so would defeat the ends of justice. See *Terminello* v. *City of Chicago,* 337 U.S. 1.

II.

It is contended by the respondent that the petitioner did not claim that any prejudice resulted to him by reason of the sheriff's action in summoning bystanders to serve as jurors. We confess that we do not understand this argument. The petitioner has always maintained that the selection of jurors who were described as "cronies" of the sheriff deprived him of a fair and impartial jury. The petitioner contended in the trial court and before the Supreme Court of the State of Illinois that inasmuch as the sheriff is an adjunct of the prosecutor's office, he

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would most likely call those persons whom he knew would favor the prosecution. The failure to select jurors from the jury commissioners list was not a mere technical failure to follow the requirements of the statute. There was no attempt made to follow the provisions of the Jury Commissioners Act to select additional jurors. The method employed by the court in this case permitted the sheriff to select jurors who would be hostile to the defendant. The failure to comply with the Jury Commissioners Act lends itself to abuse since it is likely that the prosecution would be the recipient of the special influence of the sheriff in the selection of the jury.

The petitioner was prejudiced in that he had a right to be tried by a jury selected by the jury commissioners and not by "cronies" of the sheriff.

The respondent cites the case of *Fay* v. *New York,* 332 U. S. 261, which sustained the selection of a "blue ribbon" jury. It is obvious that there is no similarity between our case and the *Fay* case. The petitioner in our case was deprived of the selection of a jury as required by the Jury Commissioners Act, whereas in the *Fay* case the jurors were selected by the administrative officials charged with the duty of preparing jury panels.

CONCLUSION.

In view of the importance of the question whether the decision of the Supreme Court of the State of Illinois may deprive every litigant of the State of Illinois due process of law by depriving him of the right to a fair sampling of jurors under the Jury Commissioners Act, the petition for a writ of certiorari should be allowed.

Respectfully submitted,

CHARLES A. BELLOWS,
Attorney for petitioner.